92-119

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1991

DANIEL P. SHEEHAN and
THE CHRISTIC INSTITUTE
Petitioners,

v.

JOHN HULL, RICHARD SECORD, ALBERT HAKIM, THOMAS CLINES, ADOLFO CALERO, ROBERT OWEN, JOHN SINGLAUB, THEODORE SHACKLEY, RAFAEL "CHI CHI" QUINTERO, RONALD JOSEPH MARTIN, Sr., MARIO DELAMICO, JAMES McCOY and JORGE GONZALEZ,
Respondents.

Petition For A Writ of Certiorari
To The United States Court of Appeals
For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI
of
DANIEL P. SHEEHAN, ESQ.
and
THE CHRISTIC INSTITUTE

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QUESTIONS PRESENTED

1. May a Three-Judge Panel of a Court of Appeals award appellees their full attorneys' fees under Rule 38 of the Federal Rules of Appellate Procedure with no hearing or no argument on the issue with no explanation whatever other than a single-sentence declaration that the Panel finds all of the appellants' arguments on appeal to have been "frivolous" -- even after the Panel has been asked in a Petition for Rehearing to provide some explanation for its ruling?

2. In light of this Supreme Court's 1989 ruling in Pavelic & LeFlore v. Marvel Entertainment Group, 493 U.S. 120 prohibiting the imposition of an Order of Sanctions under Rule 11 of the Federal Rules of Civil Procedure against the law firm of an individual attorney accused of violating Rule 11 based upon an "agency" theory

of liability, can a 1990 appeal of a 1989 $1,034,000 Rule 11 Order of Sanctions entered against a law firm by a District Court solely on the grounds of an "agency" theory of liability be deemed by a Panel of a Court of Appeals to have been a "frivolous" appeal subjecting that appellant law firm to liability for up to $400,000 in additional sanctions under Rule 38 of the Federal Rules of Appellate Procedure?

3. In light of this Supreme Court's 1979 ruling in Roadway Express, Inc. v. Piper, 447 U.S. 752 mandating a due process hearing on the record before an attorney can lawfully be subjected to a "bad faith" Order of Sanctions for attorneys' fees by a District Court, can a 1990 appeal of a 1989 "bad faith" Order of Sanctions entered by a District Court against a plaintiff's attorney for the full attorneys' fees incurred by the defendants in a

case totalling over $1,000,000 be deemed a "frivolous" appeal by a Court of Appeals when this bad faith Order of Sanctions was imposed against the attorney without any due process hearing of any kind based exclusively upon contradicted affidavits submitted by the defendants' attorneys accusing the plaintiff's counsel of lying to the court?

4. In light of the plain wording of Title 28 U.S.C. Section 1927 clearly restricting any penalty imposed for "multiplying litigation" under that statute exclusively to the allegedly offending attorney who filed the offending motion, and in light of the express admission of the party seeking the Section 1927 penalty against the attorney that there is "no merit" whatsoever in District Court Order imposing a Title 28 U.S.C. Section 1927 Order of Sanctions of over $1,000,000 against the law firm of the allegedly of-

fending attorney, can an appeal taken by this law firm from the District Court's Section 1927 Order of Sanctions entered against it be deemed "frivolous" by a Court of Appeals and made part of the basis for holding that appellant-law firm liable for up to $400,000 in appellate attorneys' fees under Rule 38 of the Federal Rules of Appellate Procedure?

5. In light of this Supreme Court's 1989 ruling in Pavelic & LeFlore v. Marvel Entertainment Group, 493 U.S. 120 prohibiting the imposition of sanctions against the law firm of an attorney who allegedly violates his personal duty to the Court based solely on an "agency" theory of liability of the law firm, can an appeal taken by a law firm from a $1,000,000 Order of Sanctions entered against that law firm under the Bad Faith exception to the American Rule Against Fee-Shifting solely on the basis of its "agency" authority

over the allegedly offending lawyer be deemed to be a "frivolous" appeal by the Court of Appeals?

6. In light of this Supreme Court's 1986 controlling concurring opinion in Celotex v. Catrett, 477 U.S. 317 written by Mr. Justice White at 328, can an appeal taken from a District Court's entrance of a Rule 56 Order of Summary Judgment be deemed "frivolous" by the Court of Appeals when that Rule 56 Order was predicated solely upon a finding by the District Court that the plaintiff did not submit his evidence to the District Court in court admissible form to negate the defendant's sworn unsupported assertion that the plaintiff possessed "no evidence" linking the indicted perpetrators of a May 1984 terrorist bombing which injured the plaintiff to the defendants' publicly proven weapons and explosives supply operation -- when the plaintiff named to the

court witnesses who were able to provide this linkage, but did not provide the evidence of these witnesses to the court before trial in admissible form?

7. Can a plaintiffs attorney's appeal taken from a Rule 11 Order of Sanctions entered against him in excess of $1,000,000 in defendants' attorneys' fees be deemed to have been a "frivolous" appeal when that Rule 11 Order of Sanctions was entered by the District Court solely on the purported ground that the plaintiff's attorney could not have possibly formed a good faith belief that the charges made in this complaint were true -- when, indeed, the very principals named as those who injured his plaintiff are subsequently indicted for first-degree murder for the very bombing which injured the attorney's plaintiff and virtually all of the defendants named in the complaint are subsequently shown by sworn public

testimony to have been active participants in an ongoing criminal racketeering enterprise with the very principals indicted for the bombing which injured that attorney's plaintiff?

PARTIES TO THE PROCEEDING

Petitioners Tony Avirgan and Martha Honey were plaintiffs in the District Court below and were the appellants before the Eleventh Circuit Court of Appeals appealing both the Rule 56 Order of Summary Judgment entered by the District Court against their 1986 Complaint in 1988 and the Order of Sanctions entered against them by the District Court pursuant to the Bad Faith Exception to the American Rule Against Fee-Shifting.

Attorney Daniel P. Sheehan was the attorney-of-record for the plaintiffs in their cause of action in the District Court below and was the attorney-of-record for the plaintiffs before the Panel of the

Eleventh Circuit Court of Appeals representing the plaintiffs in their appeal of the Rule 56 Order of Summary Judgment entered against their Complaint. Petitioner Sheehan was an appellant in his own right before the Eleventh Circuit Court of Appeals appealing the Order of Sanctions entered against him by the District Court pursuant to Rule 11, Title 28 U.S.C. Section 1927 and the Bad Faith Exception to the American Rule Against Fee-Shifting.

Petitioner The Christic Institute was neither counsel of record in the District Court below or in the Eleventh Circuit Court of Appeals. Petitioner The Christic Institute was merely the law firm which employed Attorney Sheehan and was an appellant in the appeal taken before the Eleventh Circuit Court of Appeals seeking a review of the $1,000,000 Order of Sanctions entered against this law firm by the District Court pursuant to Rule 11, Title

28 U.S.C. Section 1927 and the Bad Faith Exception to the American Rule Against Fee-Shifting.

Appellees before the Eleventh Circuit Court of Appeals were John Hull, Richard Second, Albert Hakim, Thomas Clines, Adolfo Calero, Robert Owen, John Singlaub, Theodore Shackley, Raphael "Chi Chi" Quintero, Ronald Joseph Martin, Sr., Mario Delamico, James McCoy, and Jorge Gonzalez.

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Rule 38, Federal Rules of Appellate Procedure

Rule 56, Federal Rule of Civil Procedure

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OPINIONS BELOW

There are no opinions, reported or unreported, with respect to the imposition of sanctions for the appeals. The Order of the Court of Appeals awarding sanctions

for the appeal appears in petitioners Avirgan's and Honey's appendix ("Pet. App.") at 1(a)-2(a). The Order Denying Rehearing is unreported and appears at Pet. App. 26a. The opinion of the Court of Appeals affirming the decisions of the District Court on both the Rule 56 Order of Summary Judgment and on the sanctions appears at Pet. App. 3a-25a and is reported at 932 F.2d 1572. The Order Denying Rehearing and Rehearing en banc of that ruling is not reported and appears in Pet. App. 26a. The February 2, 1989 Order of the United States District Court for the Southern District of Florida entering the Orders of Sanctions and awarding costs and attorneys' fees, together with its Order of February 27, 1989, clarifying that Order are reported at 705 F.Supp. 1544.

JURISDICTION

The order of the Court of Appeals awarding sanctions on appeal pursuant to Rule 38 of the Federal Rules of Appellate Procedure was entered on February 26, 1992. On May 14, 1992, Justice Kennedy signed an order extending the time to file a petition for a Writ of Certiorari to and including June 25, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND RULES INVOLVED

Rule 38 of the Federal Rules of Appellate Procedure provides as follows:

> If a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee.

Rule 11 of the Federal Rules of Civil Procedure provides in pertinent part as follows:

> Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose

> address shall be stated. . . . The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation, . . . If a pleading, motion, or other paper is singed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, appropriate sanction, which may include an order to pay to the other party or parties the amount of the pleading, motion, or other paper, including a reasonable attorney's fee.

28 U.S.C. 1927 provides as follows:

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in ay case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

STATEMENT OF THE CASE

Introduction

This petition seeks review of the manner in which a Panel of the United States Court of Appeals for the Eleventh Circuit imposed Rule 38 sanctions against the petitioners. The principal issues relate to that Court's decision to require petitioners to pay all of the attorneys' fees incurred by respondents in the Court of Appeals defending the consolidated appeals to them from both the District Court's Rule 56 Order of Summary Judgment and its Order of Sanctions. With no explanation whatsoever, either initially or after rehearing, the Panel simply declared that both appeals were totally "frivolous" and ruled that Petitioners were jointly liable for up to $400,000 in attorneys' fees, with the final amount to be determined in the first instance by the District Court. Not only is the ruling in

error because it fails to explain in any way the basis for such a significant sanction, but it is substantively unjustified in view of the objective issues raised and the seriousness with which Respondents took the issues -- as evidenced by their two 85 pages briefs and their allegedly 2550 hours spent defending the rulings below -- and the attention that the Panel of the Court of Appeals -- which heard extended oral argument and produced a substantial published opinion that addressed both the merits of the Rule 56 Order and the sanctions -- gave them.

Although virtually all of the facts in this case pertaining to the responsibility of the Respondents for the acts alleged in the Complaint were in sharp dispute, there is a core of facts on which there is basic agreement between the parties which form the basis for both the

original Order of Sanctions of the District Court and the subsequent Rule 38 Order of Sanctions imposed by the Court of Appeals. The original Order of Sanctions was imposed jointly and severally against the plaintiffs, Tony Avirgan and Martha Honey, Daniel Sheehan, the lead counsel on the merits of this case below ("Sheehan"), and his public interest law firm and employer, The Christic Institute ("Christic"), all of whom are Petitioners before this Court. As used herein, the term plaintiffs means only Petitioners Avirgan and Honey; the term "Petitioners" includes both the plaintiffs, Attorney Daniel Sheehan and The Christic Institute. The term "Respondents" means the defendants in the trial court below who were Appellees in the Court of Appeals.

On May 30, 1984, Plaintiff Tony Avirgan, a professional journalist, was attending a press conference held by Eden

Pastora in La Penca, Nicaragua, just across Rio San Juan River from the Costa Rican border. In an attempt to assassinate Eden Pastora and the journalists present, a terrorist bomb was detonated at the press conference killing eight persons and severely injuring dozens of others, including the plaintiff, Tony Avirgan. As a result of his injuries, Avirgan was hospitalized, sustained major medical expenses, and lost considerable time from his work. His professional camera equipment was also totally destroyed in the attack.

Both because of his journalistic interest in the activities in Central America and the injuries he sustained, Plaintiff Avirgan and his wife, who is also a journalist, but who was not with him at the bombing, undertook a major investigation into the incident at the direct request of the American Newspaper

Guild. Plaintiffs Avirgan and Honey eventually published a report entitled "La Penca: Report of an Investigation," which expressly named a number of the Respondents as responsible for the events leading to the La Penca bombing. Following publication of that report, the Respondent John Hull sued the plaintiffs for criminal libel in Costa Rica, and at a trial held in early May, 1986, the Plaintiffs were acquitted of the charge, a ruling that was affirmed on appeal.

Meanwhile, an investigation into these and related events was being undertaken by The Christic Institute and Attorney Sheehan. Plaintiffs Avirgan and Honey met with Attorney Sheehan, and they asked Attorney Sheehan to file a civil lawsuit in which Attorney Sheehan would represent the plaintiffs on a pro bono basis in an effort to recover their damages and to obtain a federal court injunction stopping

the ongoing criminal conspiracy which they believed had caused these and numerous other injuries. It was agreed that the allegations which would be set forth in the lawsuit would be based on both the investigations undertaken by the plaintiffs and those undertaken by Attorney Sheehan. Since the plaintiffs are not attorneys, the details of the Complaint and the litigation were to be left to Attorney Sheehan.

A. Proceedings in the District Court

The Complaint was filed on May 29, 1986, in the United States District Court for the Southern District of Florida with jurisdiction based on 18 U.S.C. § 1964, commonly known as the Racketeer Influenced and Corrupt Organizations Act ("RICO"), and 28 U.S.C. § 1331. Named as defendants were John Hull and a number of others who had already been expressly identified in plaintiffs' La Penca report, a well as

other individuals whose participation in the RICO conspiracy alleged in the Complaint had been determined through the separate investigation undertaken by Attorney Sheehan and professional investigators hired by Attorney Sheehan. The plaintiffs, who resided in Costa Rica at all relevant times, did not sign either the Original Complaint, the Amended Complaint, nor did they execute any affidavits. They did, however, review both the Original Complaint and the Amended Complaint before their filing. The Plaintiffs did sign affirmations as to the answers to several sets of interrogatories, and they were eventually deposed at great length, with their testimony covering more than 800 pages between them.

Instead of answering the Complaint, the defendants filed a Motion to Dismiss, which included a contention that the RICO

Complaint could not be filed without containing on its face adequate factual specificity rising to the level of "probable cause." Although denying the need to establish such probable cause, Attorney Sheehan filed with the District Court an affidavit detailing at great length the investigations undertaken to support the Complaint prior to its filing. The District Court denied the Motion to Dismiss. In its ruling, the District Court concluded that there was no probable cause requirement, and it expressly upheld the sufficiency of the Complaint. The Court made no mention of the Sheehan Probable Cause Affidavit in its ruling. Discovery then proceeded with little or no involvement of the plaintiffs, other than that noted above.

Eventually, Respondents moved for summary judgment, and the District Court granted the motion on the purely legal

ground that there was no "admissible" evidence that showed a causal connection between the RICO conspiracy alleged in the Complaint and the 1984 bombing injuries to the plaintiffs -- because all of plaintiffs' evidence on this issue was allegedly "inadmissible hearsay." Avirgan v. Hull, 691 F.Supp. 1357, 1375-76 (S.D. Fla. 1988). Attorney Sheehan then filed a notice of appeal on behalf of the plaintiffs and represented them on the appeal taken from this Rule 56 Order of Summary Judgment. In this appeal, it was contended that the motion for summary judgment had been improperly granted. In response to the brief filed on behalf of Plaintiffs, Respondents filed a consolidated brief of in excess of 85 pages defending the Rule 56 ruling below.

Meanwhile, most of the respondents moved in the District Court below for sanctions, in the form of attorneys' fees

and costs, relying on Rule 11 of the Federal Rules of Civil Procedure, 28 U.S.C. § 1927, and the "bad-faith" exception to the American Rule.

Attorney Sheehan filed an Opposition to this Motion For Sanctions supported by an extensive sworn affidavit making it undisputedly clear that the witnesses referred to by Attorney Sheehan in his earlier December 1986 Probable Cause Affidavit did possess directly admissible evidence against certain of the defendants -- and that Attorney Sheehan had never represented to the Court that this evidence was "first-hand," "eye-witness" evidence proving that each defendant had participated in the setting of the bomb which had injured Plaintiff Avirgan -- but that this evidence was, instead, evidence verified by later depositions and sworn statements showing that these witnesses had been present during direct admissions of the

criminal conduct charges made to these witnesses by certain of the defendants (made thereby an exception to the rule against hearsay). Attorney Sheehan's Affidavit In Opposition to the Motions For Sanctions thus directly contradicted certain affidavits filed by the defendants taken from certain of Attorney Sheehan's "sources" referred to in his Probable Cause Affidavit.

The District Court refused, however, to hold any evidentiary hearing inquiring into the apparent contradiction between these affidavits and those of Attorney Sheehan.

Instead, on February 2, 1989, the District Court entered an Order of Sanctions granting the defendants' motions without any hearing of any kind and awarded the defendants over $1 million in costs and attorneys' fees. The Court, thereupon, required the Plaintiffs, Attorney

Sheehan and Attorney Sheehan's law firm to post a cash bond of $1,211,818.36 to avoid collection during pendency of the consolidated appeals.

In support of this ruling, the District Court's brief discussion asserted that, after "two years of protracted and extensive discovery," plaintiffs were "unable to produce a single witness who could state the defendants exploded the bomb or were responsible for the assassination attempt" and, therefore, the attorneys for the plaintiffs, at the time of their filing of the Complaint, "must have known prior to suing that they had no competent evidence to support" the claim. Pet. App. 24a. The District Court then referred to Attorney Sheehan's 1986 probable cause affidavit, which the District Court claimed was the basis on which "plaintiffs were permitted to conduct two

years of discovery." Id. at 25a. The Court then stated that many of the allegations "were based upon unsubstantiated rumor and speculation from unidentified sources with no first hand knowledge." Id. at 26a. (Emphasis added). The District Court then concluded, quoting from the Eleventh Circuit opinion in Colins v. Walden, 834 F.2d 961, 964 (1987), that "plaintiffs 'had every reason to know they stood no chance of proving' that the defendants were responsible for the injuries to Tony Avirgan." Id. Equating this ultimate inability to prove their case by direct first-hand eye-witness proof with an "abuse of the judicial process," the District Court then held that "the plaintiffs" were required to "make the defendants whole by paying the fees the defendants have been forced to expend for attorneys in this action." Id. Finally, in

the course of its much lengthier discussion of the amount of fees and costs, the court noted that the award was made "coextensively pursuant to the 'bad faith' exception to the American Rule, see Alyeska Pipeline Service Co., 421 U.S. 240 (1970), 28 U.S.C. § 1927 (1986), and Fed. R. Civ. P. 11." Pet. App. 35a n.5.

Although Respondents had prevailed on the Motion for Sanctions, they themselves asked the District Court to explain exactly who was responsible for what costs and fees. Thereafter, on February 24, 1989, the court issued a three-and-a-half page "Order Clarifying Order Dated February 2, 1989," which stated that "liability for the costs and fees must rest jointly and severally with Daniel Sheehan, Esq., The Christic Institute, and the plaintiffs Tony Avirgan and Martha Honey." Pet. App. 43a. The court then attempted to explain

the use of its term "coextensively," suggesting that it "indicates that each of the authorities, separate unto itself, support the entire award. Of course different legal standards govern the award under each authority." Id. The District Court found that Attorney Sheehan was liable as lead counsel because he formulated "the litigation strategy and tactics that justified the entire award under the bad faith exception and 28 U.S.C. § 1927." Id. The Court further observed that Attorney Sheehan "also signed the Complaint and affidavit upon which the court justified the entire award under Fed. R. Civ. P. 11." Id. The Court also based the sanction on Attorney Sheehan's alleged neglect of "his continuing obligation under all three authorities to assure that the allegations in the complaint and the affidavit were borne out in the discovery process." Id.

The District Court then summarily declared that Attorney Sheehan's law firm, The Christic Institute was liable, since it was the "self-pronounced law firm representing the plaintiffs" whose "attorneys carried out Mr. Sheehan's litigation strategy, and willingly participated in the litigation tactics." Pet. App. 44a. To support its extraordinary ruling, the District Court noted only that Christic's name appeared on "all or most of the plaintiffs' filings" and that "it acted though its officers, the attorneys representing the plaintiffs," which made it liable because of "its agents' neglect of their continuing duty under all three authorities to avoid this frivolous lawsuit." Id.

Finally, the District Court turned to the award against the plaintiffs, which it sustained "[f]or like reasons." Id. First, it asserted that the plaintiffs

cannot be liable under Rule 11 or Section 1927 because they are not attorneys, but found them liable because they were "willful participants in Mr. Sheehan's litigation strategy." Id. It further noted that the Institute paid them "approximately $50,000 for consultation, public speaking, and trips from Costa Rica to the United States," id., although the Court failed to acknowledge that virtually all of that money was simply reimbursement for receipted out-of-pocket expenses, principally for travel, or that it was authorized compensation in Costa Rica for investigative work that was done by the Plaintiffs after the suit was filed. The Court did not explain either its theory of "willful participation" or the relevance of the reimbursements and other payments, nor did it make any other findings or cite any other evidence; it simply declared that the plaintiffs were liable for the

entire award under the bad-faith exception. Id.

B. The Opinion of the Court of Appeals

The appeals from the Orders of Sanctions were consolidated with those on the merits of the Rule 56 Order of Summary Judgment in the Eleventh Circuit.[1] As they had done on the merits of the Rule 56 Order of Summary Judgment, Respondents defended the Order of Sanctions entered below, filing another brief in excess of 85 pages. After hearing extensive oral argument on both appeals, a Panel of the Eleventh Circuit affirmed both the Rule 56 Order and the Sanctions. It first rejected the claims that summary judgment was improperly granted and then turned to the

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[1] Attorney Sheehan acted as counsel before the Court of Appeals only on the merits of the Rule 56 Order of Summary Judgment. On the sanctions issue, outside counsel was retained to represent the plaintiffs, The Christic Institute and Attorney Sheehan.

sanctions issues. The Panel simply quoted three paragraphs from the District Court's Order of Sanctions, with no mention made of the staggering amount involved, the lack of any hearings on the issues raised on appeal. Pet. App. 18a-19a. The Panel then wrongly asserted that the plaintiffs did not dispute the quoted paragraphs. Id. The Panel then began its discussion of the sanctions award by stating that "Sheehan could not have reasonably believed at the time of the filing of the complaint and the signing of the affidavit that the complaint was well-grounded in fact," citing to Rule 11 in a footnote. Pet. App. 20a-21a and n. 11. The Panel then focused on Attorney Sheehan's probable cause affidavit, from which it concluded that it is "obvious that if the appellants [not distinguishing between plaintiffs and their attorneys] knew (must have known) prior to filing this lawsuit

that they had no competent evidence, then this complaint was not well-grounded." Id. (emphasis added). To buttress its finding of liability, the Panel simply pointed to the fact that "discovery did not yield any witnesses who could link the alleged criminal enterprise to the bombing." Id.

Turning to the "clarification" order, the Panel noted that the plaintiffs were found liable "as willful participants in Sheehan's litigation strategy" under the bad-faith exception, this time with a footnote citation to 28 U.S.C. § 1927, which applies only to attorneys. Id. a 22a. The Panel also observed that courts "may assess attorneys' fees against litigants, counsel, and law firms who willfully abuse judicial process by conduct tantamount to bad faith" and then concluded that it had "no difficulty in finding that these appellants unreasonably and

vexatiously multiplied these proceedings," without identifying in any way manner in which any party had done this. Id. The Panel then simply requoted the portion of Collins v. Walden, supra, which states that, when "it becomes apparent that discoverable evidence will not bear out the claim, the litigant and his attorney have a duty to discontinue their quest" id., without explaining how even an unsupportable failure to abandon a case at some point later in a litigation could possibly sustain an award of over $1 million for the full attorneys' fees accumulated from the very inception of the case to the end.

C. Proceedings Under Rule 38

In light of their unexplicated success at the Court of Appeals level, respondents decided to seek fees for all of their work in the Court of Appeals, pursuant to Rule 38, FRAP, which allows for costs and damages, including attorneys'

fees, to be imposed for appeals that are "frivolous." A few of their applications were timely, but most of the others, which were not, were simply permitted by the Court over Petitioners' objections. Altogether, these requests for attorneys' fees alleged that the attorneys had spent in excess of 2550 hours to defend against these two appeals, for which they sought fees of approximately $400,000. Attorney Sheehan promptly filed a consolidated opposition on behalf of all four petitioners, but the Panel took no action for over seven months.

The Plaintiffs then retained separate counsel, and with Attorney Sheehan and The Christic Institute each filed Petitions in this Court seeking review of the Panel's affirmance of the Orders of Sanction. Respondents then sought and were given a 30 day extension of time to file their consolidated Opposition of over

25 printed pages. Suddenly, on Christmas Eve, the Eleventh Circuit Panel summarily ruled on Petitioners' Motion to Stay the Mandate and simply denied it without explanation. This necessitated an Emergency Motion in this Court by Petitioners, which Respondents opposed. Justice Kennedy, however, granted this motion staying the mandate until this Court could act on the Petitions. This ruling occurred on January 16, 1992, when the Court denied all of the Petitions.

Counsel for Plaintiffs then turned to the still pending motion for attorneys' fees in the Court of Appeals and concluded that it would be advisable to file a separate memorandum on behalf of the individual plaintiffs, highlighting both the reasons why no sanctions should be awarded against anyone and explaining why it would be particularly unjust to impose them on lay persons who should not be expected to

discern which arguments were and were not appropriately made by their attorneys on appeal. Accordingly, on February 18, 1992, counsel for the Plaintiffs moved for leave to file a supplemental memorandum of seven pages, which was attached to the motion, along with an affidavit of counsel explaining the reasons for the request.

Before the time to respond to this motion had even expired, the Three-Judge Panel of the Court of Appeals entered an Order granting the dormant motion for attorneys' fees, but gave no reasons whatsoever in support of its conclusion that both the Rule 56 appeal and the appeal from the Order of Sanctions were "frivolous." (Pet. App. 1a.) Although that Panel had read all the appellate briefs, had heard the oral argument, and had written the nine-page published opinion, it remanded the case to the District Court "for an evidentiary hearing to determine a

reasonable fee." Id. By that same order, the Panel also denied Petitioners' motion for a hearing on the fees issue, and by a separate order, also entered on February 26th, denied Plaintiffs' motion to file their short supplemental memorandum.

Despite the magnitude of the potential appellate fee liability to which they were being subjected, Petitioners were reluctant to seek review in this Court without first affording the Panel an opportunity to explain what it had done and why. Therefore, Petitioners filed a timely Petition for Rehearing with the Panel in which they pointed out that courts that grant potentially large attorneys' fee awards are obligated as a matter of law to explain the basis for doing so. Petitioners then raised a number of specific questions which they believed the Panel should address in order to support its summary declaration that both appeals were totally

frivolous. (Pet. App. 27a-33a.) Among the points that Petitioners made was that the Court of Appeals Panel had failed even to state which persons were liable for which fees on which appeals. Id. at 26a. The Panel accorded Respondents an opportunity to reply, and a month after their response was received, the Panel entered an Order in which it said no more than that rehearing "is denied." Id. at 26a.

REASONS FOR GRANTING THE WRIT

THE DECISIONS BELOW ARE CONTRARY TO THE DECISIONS OF THIS COURT AND OTHER COURTS OF APPEALS AND SO FAR DEVIATES FROM THE ACCEPTED PRACTICE AS TO WARRANT REVIEW BY THIS COURT.

Review is warranted in this case essentially because the Court of Appeals acted in a wholly arbitrary manner in imposing sanctions against petitioners in the form of attorneys' fees that may well reach $400,000, and in refusing, both in its initial decision and on rehearing, to provide any basis whatever for its ruling.

This conduct by a Panel of a Court of Appeals overcomes any presumption of regularity or presumption that it properly exercised its discretion in ruling on the sanctions for these two appeals. Indeed, this conduct also calls into serious question the objectivity of the prior decision of this Panel affirming the $1.2 million in sanctions originally imposed by the District Court.

1. The decision whether to impose sanctions is committed to the proper discretion of the court before which the allegedly improper conduct occurred. Cooter & Gell v. Hart Marx Corp., 496 U.S. 384 (1990). In reaching this result, this Court analogized sanctions orders to awards of attorneys' fees, which are reviewed on an abuse of discretion basis. Id. citing Pierce v. Underwood, 487 U.S. 552 (1987). In the context of attorneys' fees awards, this Court has made it clear

that the court awarding the fees must, however, provide some articulable explanation of its rationale for doing so, in part to assure that the basis for the ruling is available for a reviewing court. Hensley v. Eckerhart, 461 U.S. 424, 437 (1983).

The principal reason why review is required here is because the Panel of the Court of Appeals gave no explanation whatever for imposing sanctions beyond its one word declaration of the two appeals as being "frivolous." On the possibility that this failure to explain was a simple oversight of the law, Petitioners filed for a rehearing, explaining to the Panel its legal obligation in this regard, citing relevant authority, and asking to have the basis for this ruling set forth. Once again, the Panel of the Court of Appeals' answer was a simple single word: "denied." The Petition for Rehearing did not simply

woodenly ask for an explanation: It articulated 11 specific questions that needed to be addressed in order to explain the sanctions order. (Pet. App. 29a-31a.) Yet that specific request had no effect upon the Panel. There can, therefore, be no doubt that the Panel below has consciously resolved that it will provide no explanation whatever for its ruling.

Beyond the important principle that a court which relies upon it discretionary authority must demonstrate that it has, in fact, exercised that discretion properly within the bounds of law, American courts are entirely clear in ruling that there is an explicit legal obligation of such a court to explain the basis for a sanctions award and it doctrinal analog, an attorneys' fee award, Hensley, supra; Grano v. Barry, 783 F.2d 1104, 1112 (D.C. Cir. 1986); Hayes v. Heckler, 785 F.2d 1455, 1456-57 (9th Cir. 1986); Thomas v. Capital

Security Services, Inc., 836 F.2d 866, 883 (5th Cir. 1988) (en banc); Walter v. Fiorenzo, 840 F.2d 427, 436 (7th Cir. 1988). These rulings by various courts were specifically called to the attention of the Eleventh Circuit Panel, but the Panel nonetheless refused to provide any explanation for its action.

The legal necessity for such an explanation in these circumstances has recently been reasserted by the Advisory committee on Civil Rules in proposing an Amendment to Rule 11, which is the District Court analog of Rule 38 relied upon in the case at bar. That Amendment, which will essentially codify the prevailing law -- except as it may be understood by the Eleventh Circuit, is now pending before the Standing Committee on Rules and Practice. It provides as follows:

> When imposing sanctions, the court shall describe the conduct determined to constitute a violation of those rules and explain the basis

> for the sanction imposed. (Emphasis added.)

This legal requirement is essential not only because it assures that the court will give adequate consideration to the issue of sanctions, but also because, without it, it is impossible to know whether the sanctioning court made erroneous rulings of law, which are subject to plenary review, Cooter & Gell, supra, 110B S.Ct. at 24558-59, or whether the court abused its discretion. In short, if a District Court Judge had imposed Rule 11 sanctions in the manner done here, where the attorneys' fees at issue may reach as high as $400,000, a Court of Appeals would be required to summarily reverse the ruling and remand the case with a demand for an explanation. This Supreme Court should do no less when a Court of Appeals Panel, rather than a District Court, undertakes this same conduct.

2. Ordinarily, the simple remedy for such a failure to offer the legally required explanation would be a simple remand with a demand for a full explanation. However, this is not such an ordinary case -- because the Eleventh Circuit Panel herein has refused not once, but twice, to do what the law clearly requires. The first time it took over seven months after all briefs were submitted to reach its original decision -- waiting until this Court had denied certiorari on the prior Rule 11 petitions before acting. The second refusal came in response to a specific Petition for Rehearing which left no doubt whatever as to the extent of the Court's legal obligation to provide an explanation for its action. Moreover, the Panel made no attempt at all to provide a rationale as to why it could not set forth its reasons, but simply denied the Petition for Rehearing.

Presumably, faced with an order from this Court to explain its rationale, the Court of Appeals would at least provide some stated reasons for the result that it had already reached. Doubtless, this explanation would be clothed in discretion-exercising phrases, such as "after giving careful consideration to all arguments raised by appellants" or "having reviewed the claims made on these appeals in great detail," or, "based on all of the factors in this case, we are left with the firm conviction that the appeals were frivolous." However, if this were the case, Petitioners would be compelled to return to this Court, arguing that these "explanations" were nothing more than after-the-fact unexplicated declarations attempting to insulate an award of sanctions that had already been made for some still entirely

unstated and quite possibly totally improper, reason. Thus, the principal result of any such simple remand would not be to afford insight, but would simply generate further delay and more expense.

There is one further reason why a simple remand with instructions to explain its reasoning would not help ultimately resolve this issue. Although Petitioners recognize that the sanctions determination is a discretionary one, there are specific limits to that discretion, and Petitioners argue that, based on a number of undisputed facts present in this record, the conclusion that both appeals taken in this case were totally "frivolous" under Rule 38, cannot, as a matter of law, be sustained. What makes those undisputed facts so significant is that they are based on the conduct of respondents, who sought the sanctions, and the Court of Appeals which

awarded them. Especially when taken together, they are, in essence, an admission that the appeals were not frivolous. Consider the following.

A. There were two consolidated appeals, which were briefed separately. Respondents were defending rulings on, respectively, the propriety of granting summary judgment under Rule 56, and an award of sanctions under Rule 11, on which the District Court had written published opinions. Yet, to defeat the summary judgment appeal, respondents submitted a brief of more than 85 pages -- in response to appellants' brief of only 59 pages, which is 70% more than the maximum allowed by Rule 28(g) of the Federal Rules of Appellate Procedure. On the Rule 11 appeal, the two opening briefs submitted by Appellants totaled approximately 100 pages, and again respondents answered with a brief of more than 85 pages, just to defend an allegedly

frivolous appeal. One shudders to think at the length of respondents' briefs if they had truly significant issues with which to deal.

B. Not only were Respondents' briefs lengthy, but the time spent on them, according to affidavits that they submitted with their fee applications, was enormous for any appeal, let alone those alleged to be "frivolous." While several of the affidavits are unclear in places, Petitioners asserted below (Pet. App. 29a-30a), and Respondents never challenged the claim, that Respondents allegedly spent 1150 hours defending the summary judgment ruling, 1190 hours on the sanctions appeal, and 210 hours preparing for and delivering the oral arguments for both appeals, for a total of approximately 2550 hours. Moreover, Respondents' counsel had handled the case in the District Court, and so there was no need for familiarizing

themselves with the facts or the law. Furthermore, the issues presented primarily involved the application of reasonably well-established principles of law to the facts of this case, all of which were briefed and argued below by their lawyers on these appeals. To spend 2550 hours on any two appeals, which amounts to more than 50 billable hours per week for an entire year, is a tremendous investment of time that can only be justified where the questions presented are of the utmost significance and difficulty, hardly the mark of "frivolous" appeals.

C. The Eleventh Circuit hears oral argument in only 50% of the cases decided on the merits. (Pet. App. 30a.) Yet here the Panel ordered oral argument, and the Panel gave an extensive opportunity for both sides to present their positions, precisely the opposite of what would be allowed if the appeals were "frivolous."

D. Nor did the Panel simply summarily affirm the rulings below, as they would do if the appeals had been frivolous. The Panel issued a full opinion, which it sent out for publication, despite the fact that the Court issues published opinions in less than about 33$ of the cases it decides. Id. While rejecting Petitioners' arguments on their merits, the opinion never suggested that any of the arguments, let alone all of them, were "frivolous." As the opinion makes clear, the case at bar not a case in which a single case, or a specific statute plainly controlled the outcome of any issue. Rather, this was a case in which the outcome was determined by the application of the facts to important governing legal principles. Presumably, if the Panel of the Court of Appeals found these appeals to be "frivolous," it would be required to make a similar finding for all the cases

in which oral argument is not even granted, or in which no published opinion is ever issued, as well as in many other cases, like this case, in which all of the criteria for non-frivolousness would seem to have been met.

Additionally, the Court of Appeals erred not only substantively, but by error of its refusal to explain its deviation from the following standards set by this Court and others.

1. In light of this Supreme Court's 1989 controlling opinion in Pavelic & LeFlore v. Marvel Entertainment Group, 493 U.S. 120 expressly holding that the law firm of an attorney found responsible for a violation of Rule 11 of the Federal Rules of Civil Procedure could not be held liable under Rule 11 by a District Court for that attorney's conduct under agency theories, the Appellant Christic Institute, as a matter of law, could not be

deemed to have been pursuing a "frivolous" appeal in bad faith from the Miami District Court's 1989 ruling holding that law firm jointly and severely liable for Attorney Sheehan's alleged conduct expressly on an agency theory of liability.

2. The Appellant Christic Institute could not, as a matter of law, be held to have been pursuing a "frivolous" appeal in bad faith from the Miami District Court's 1989 ruling that this law firm was liable under Title 28 U.S.C. Section 1927 for Attorney Sheehan's alleged violation of that provision, which provision by its very terms applies exclusively to the individual attorney who allegedly "multiplied litigation." Indeed, to the contrary, the Appellees acknowledged, in their earlier opposition to a petition for certiorari filed by Christic, that their argument before the Eleventh Circuit Panel was incorrect.

3. It cannot reasonably be maintained that Appellant Sheehan's appeal from a $1,034,000 "Bad Faith" sanction for every cent of all of the defendants' attorney's fees from the very inception of the litigation that was imposed against him by the District Court without according him any form of hearing whatsoever to address the affidavits filed by the defendants' attorneys flatly alleging that Attorney Sheehan lied to the District Court in a 1986 filing was a "frivolous" appeal filed and pursued in bad faith by Attorney Sheehan in light of the hearing requirements expressly required by this Court prior to such sanctions in its 1979 ruling in Roadway Express, Inc. v. Piper, 447 U.S. 752 and expressly endorsed by various Judges of the Eleventh Circuit Court of Appeals itself in its 1987 en banc ruling in Donaldson v. Clark, 819 F.2d 1551.

4. Neither Attorney Sheehan nor his law firm, The Christic Institute, should be held liable under Rule 38 for allegedly pursuing a "frivolous" appeal from the District Court's Rule 56 Order of Summary Judgment -- when that very ruling was contrary to Mr. Justice White's controlling concurring opinion written in Celotex v. Catrett, 477 U.S. 317 (1986) which expressly stated that a plaintiff responding to a defendant's Rule 56 Motion For Summary Judgment which is predicated upon nothing more than that moving defendant's unilateral sworn assertion that the plaintiff has no evidence to establish a specific essential element of his case (in this case the proximate connection between the criminally-indicted defendant-perpetrators of the May 1984 bombing which seriously injured Plaintiff Avirgan and destroyed all of his business equipment and the defendants' proven, indicted,

self-confessed, "Enterprise" which was responsible for shipping explosives and weapons to the perpetrators exactly like those used in the bombing) need not submit to the District Court in court admissible form or even by way of a sworn affidavit the plaintiff's evidence establishing that element; but that the plaintiff need only reveal to the District Court that the plaintiff has witnesses and evidence to establish this essential element and provide the names of these witnesses to the Court and to the defendant in order to prevail. Celotex v. Catrett, 477 U.S. 317, at 328 (Mr. Justice White concurring as fifth, and controlling, member of majority opinion).

5. As a matter of law, an attorney's law firm cannot be held liable for the alleged "bad faith" actions of one of its attorneys on the basis of an "agency" theory (in light of this Court's ruling in

Pavelic, supra.), nor can it be held liable under some theory that the law firm is "the plaintiff" in the case, simply because the firm is a 501(c)(3) tax-exempt public interest law firm -- unless and until there is some extraordinary finding of fact made by either the District Court or by the Court of Appeals to this effect. Since no such extraordinary finding of fact was ever made in this case by any tribunal, The Christic Institute cannot, as a matter of law, be deemed to have been pursuing a "frivolous" appeal in bad faith from a ruling which lacked any such finding.

A court that hears a case has leeway in deciding whether legal arguments are "frivolous" or whether they are simply non-persuasive while still being within the bounds of reasonable advocacy. But there are plainly limits on the extent to which a court can, in effect, simply

second-guess a party and then tell them that their arguments are not only simply unpersuasive, but also "frivolous." As all American courts have recognized, not every unsuccessful argument is a frivolous one. If this were so, we would not have the American rule in the federal courts governing attorneys' fees. This case dramatically presents the question of what those limits are upon a court, and this case presents this issue in the context in which this Court can focus on exactly what the objective factors are that must guide the lower courts, and the appellate courts and set the outer parameters beyond which sanctions may not be imposed for proper appeals improperly termed to have been frivolous.

Could any reasonable individual, lay person or attorney, be expected to accept the judgment of a single District Court Judge that their conduct was so improper

as to require the payment of $1.2 million in attorneys' fees and cost, or must they run the risk that, if their appeal is rejected, all further attorneys' fees will be automatically imposed? No other Court of Appeals has taken so draconian a view of Rule 38 sanctions. This Court should grant review to correct this application of Rule 38 sanctions.

Accordingly, for all these reasons, the Court should grant review on the merits of the sanctions award by the Court of Appeals under Rule 38.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: June 25, 1992

Supreme Court, U.S.
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Nos. 91-2072, 92-119

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

TONY AVIRGAN and MARTHA HONEY,

and

DANIEL P. SHEEHAN and THE CHRISTIC INSTITUTE,

Petitioners,

v.

JOHN HULL, *et al.*,

Respondents.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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JOINT CONSOLIDATED BRIEF OF RESPONDENTS IN OPPOSITION TO PETITIONS FOR CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Court of Appeals correctly decided that the appeals were frivolous?

2. Whether the Court of Appeals was required, after thoroughly considering appeals and issuing an opinion affirming the District Court on the merits and on its imposition of sanctions for filing a frivolous lawsuit, to further issue a separate opinion with detailed findings of the specific basis for its holding that the appeals were frivolous?

PARTIES TO THE PROCEEDING

Petitioners Tony Avirgan and Martha Honey were plaintiffs in the District Court, Southern District of Florida, and appellants in the Court of Appeals. They were represented in the District Court by Petitioner, Daniel P. Sheehan and The Christic Institute.

Respondents John Hull, Jorge Gonzalez, Adolfo Calero, Robert Owens, John Singlaub, Ronald Joseph Martin, Sr., James McCoy, Mario Delamico, Theodore Shackley, and Richard Secord were all defendants in the District Court and appellees in the Court of Appeals. They were awarded attorneys' fees by the District Court, and by the Court of Appeals which were imposed against petitioners. The remaining named respondents (some of whom were never served with process) were: Bruce Jones, Rene Corbo, Felipe Vidal, Moises Dagoberto Nunez, Francisco Chanes, Ramon Cecilio Palacio, Ricardo Gris, William Gris, Roger Lee Pallais, "Amac Galil",[1] Hector Cornillot, Alvaro Cruz, Frederico Saenz, Tom Posey, Rafael Quintero, Tom Clines, Albert Hakim, Pablo Escobar and Jorge Ochoa[2]—were also defendants-appellees, but the Court of Appeals did not award them attorneys' fees.

This Brief of Respondents is in opposition to the Petitions for Certiorari of Petitioners Avirgan and Honey, Daniel Sheehan and The Christic Institute.

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[1] This was a name given by Petitioners to a person alleged to have set the bomb at the La Penca press conference. They also called him "Per Anker Hansen."

[2] Mr. Escobar and Mr. Ochoa are alleged to be members of the Medellin, Colombia, drug cartel. While named by petitioners as defendants, they were never served nor did they participate in the case.

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---

JOINT CONSOLIDATED BRIEF OF RESPONDENTS IN OPPOSITION TO PETITIONS FOR CERTIORARI

OPINIONS BELOW

The order of the Eleventh Circuit[1] which imposed sanctions for the frivolous appeals was not reported, but appears in Petitioners Appendix ("Pet. App.") at 1a-2a. The order denying rehearing is also unreported and appears at Pet. App. 26a. The opinion of the Court of Appeals affirming the decisions of the District Court on both the merits and sanctions appears at Pet. App. 3a-25a and is reported at 932 F.2d 1572. That opinion was the subject of unsuccessful Petitions for Certiorari to this

[1] The panel consisted of Circuit Judges Hatchett and Birch and Senior Circuit Judge Roney.

Court. See Supreme Court Case Nos. 91-617, 91-618, 91-619. The opinion and order of the District Court on the merits and on sanctions are reported at 691 F.Supp. 1357 (S.D. Fla. 1988) 705 F.Supp. 1544 (S.D. Fla. 1989), and 125 F.R.D. 189 (S.D. Fla. 1989).

JURISDICTION

The order of the Court of Appeals awarding sanctions on appeal was entered on February 26, 1992. On May 14, 1992, Justice Kennedy signed an order extending the time to file a petition for a writ of certiorari to and including June 25, 1992. The jurisdiction of this Court is alleged to be invoked under 28 U.S.C. 1254(1).

STATEMENT OF THE CASE

Tony Avirgan and Martha Honey, his wife, were American journalists based in Costa Rica. On May 30, 1984, during the Nicaraguan Civil War, Tony Avirgan attended a press conference held by Nicaraguan "Contra" leader Eden Pastora on the island of La Penca in the San Juan River on the Nicaraguan/Costa Rican border. At the press conference a bomb exploded killing eight people and wounding others. On May 29, 1986, Avirgan and Honey filed a complex, multi-faceted complaint in the United States District Court for the Southern District of Florida for damages allegedly arising from the bombing.

Tony Avirgan alleged that his index finger was injured in the explosion and that his camera equipment was damaged. He and his wife, through Mr. Sheehan and The Christic Institute, sued for $22,000,000.00 for alleged damages.

Avirgan and Honey claimed that the bombing was the product of a wide ranging conspiracy among members of the U.S. Government and a criminal racketeer-influenced and corrupt organization (RICO) consisting of Central Intelligence Agency operatives, military intelligence personnel, arms merchants, mercenaries, Colombian drug lords, and the Nicaraguan "Contras."

Avirgan and Honey's racketeering allegations included the following: the attempted murder of Eden Pastora; the murder of eight persons at the press conference in La Penca; the attempted murder of Avirgan at the La Penca bombing; trafficking of arms and explosives in violation of state and federal law; transferring funds from illegal weapons and explosives dealings; conspiracies to murder Eden Pastora on two occasions; conspiracy to kidnap Avirgan and Honey's alleged informants (Carlos Rojas Chinchilla and a person identified only as "David"); the murder of "David"; a conspiracy to import cocaine into the United States; and a conspiracy to murder the United States Ambassador to Costa Rica. The primary allegation, however, was that "Amac Galil," disguised as a journalist named "Per Anker Hansen," detonated the bomb at the La Penca press conference, and acted in concert with the twenty eight other persons (including the leaders of the Medellin Cartel) named in the amended complaint.

Avirgan and Honey also alleged state law claims which included: battery, loss of consortium, assault, intentional infliction of mental distress, trespass, damage to personal property, and a state RICO claim under Fla.Stat. § 895.03.

Petitioners requested wide, liberal discovery which was permitted on the basis of Sheehan's sworn Affidavit summarizing the testimony of 79 "secret" and undisclosed persons who Sheehan represented would substantiate the allegations of the lawsuit. These secret sources allegedly included FBI agents, DEA agents, a priest, a farm worker, drug dealers, CIA employees, etc.

Two years of vigorous, spirited, and expensive litigation ensued. In the last four and one-half months prior to the entry of Summary Judgment, exhaustive discovery took place consisting of dozens of depositions noticed by Petitioners, numerous sets of interrogatories and production of thousands of pages of documents. Petitioners filed

a list of over 2,000 witnesses to be called at trial by Petitioners.

Several Respondents moved for Summary Judgment alleging that Avirgan and Honey had failed to produce evidence to support any claim. In addressing this motion, the District Court, Chief Judge James Lawrence King, thoroughly analyzed the evidence that Avirgan and Honey presented in order to determine whether they had shown genuine issues of material fact. Finding the purported "evidence" to in fact be inadmissible third and fourth-level hearsay, the District Court ruled that Avirgan and Honey failed to adduce admissible evidence sufficient even to raise a factual issue that the Respondents were the proximate cause of their injuries and granted Respondents' motions for summary judgment on all claims. *Avirgan v. Hull;* 691 F. Supp. 1357 (S.D. Fla. 1988).

The District Court, by a subsequent order, granted Respondents' motions for costs and attorney's fees, ruling that the demonstrated abuse of the judicial process required that Avirgan and Honey, as well as Mr. Sheehan and The Christic Institute, make the Respondents whole by paying the fees the Respondents were forced to spend in defending the lawsuit. Moreover, the District Court ruled that liability for these costs and fees rested jointly and severally with Avirgan and Honey, Daniel Sheehan and the Christic Institute. *Avirgan v. Hull*, 705 F.Supp. 1544 (S.D. Fla. 1989).

The central basis on which the District Court imposed sanctions award was the conduct of Petitioners. Tony Avirgan and Martha Honey were not typical passive clients. First, they prepared an alleged "investigative" report ("The La Penca Report") which was a cornerstone of the lawsuit and The Christic Institute fundraising efforts to support the lawsuit. They were intimately familiar with the facts and the allegations they were making about the Defendants. As journalists and clients, they actively participated in virtually every part of the

litigation, attending depositions (most of which were videotaped and functioned as press events as well), making speeches and giving press conferences throughout this country and others. They admitted that during the case they reviewed the pleadings and affidavits. They actively participated in the political campaign which Mr. Sheehan and The Christic Institute waged concurrently with, and as part of, the lawsuit. They travelled extensively allegedly "investigating" the lawsuit. They participated in the numerous publications (some of which were pleadings filed in the case) which The Christic Institute sold to raise money for the lawsuit. They assisted in the numerous concerts and other fundraisers and direct mail marketing designed to raise the over $9,000,000.00 budgeted for the lawsuit by Petitioners. In return, Avirgan and Honey received from The Christic Institute a substantial monthly stipend for their participation in the lawsuit. See 125 F.R.D. at 190.

The District Court therefore had ample basis to find that Avirgan and Honey were thoroughly familiar with the evidence, or lack thereof, to sustain the lawsuit. Avirgan and Honey were wilful participants in the litigation strategy and were properly held liable under the bad faith exception. *Avirgan v. Hull*, 125 F.R.D. 189 (S.D. Fla. 1989).

Likewise, Mr. Sheehan did not act as an ordinary lawyer in this suit. Mr. Sheehan, as chief counsel and investigator of The Christic Institute, personally swore to truth of the allegations of the lawsuit and to the testimony of the alleged "secret sources." He and his wife (who was Executive Director of The Christic Institute) were the main fundraisers. As he said in one of his many speeches about the Christic "Contragate" project:

> "Well, we were quite distressed by this and we felt that we should hurry up and find ourselves a client, since we are an organization that is tax exempt, a public interest organization like American Civil Liberties Union or the NAACP. We were allowed to

engage in fomenting litigating." (R37.1218 Ex. F at 27.)[2]

Therefore, based on the totality of Petitioners' actions, it was predictable that the District Court would find all Petitioners jointly and severally liable for sanctions. As the District Court found:

> The attorneys for the plaintiffs, The Christic Institute, must have known prior to suing that they had no competent evidence to substantiate the theories alleged in their complaint. Plaintiffs' lead counsel, Daniel Sheehan, supplemented the complaint with a detailed affidavit outlining the purported testimony of seventy nine witnesses who Mr. Sheehan stated had factual knowledge that these defendants set and exploded the bomb that caused plaintiff's injuries.
>
> The seventy-nine witnesses were identified only by number. Plaintiffs' counsel refused to identify the names and addresses of the vast majority of the seventy-nine witnesses until ordered to do so by the court. Plaintiffs appealed the order requiring them to disclose the identities of the witnesses. These actions by plaintiffs and their counsel prevented the defendants from taking depositions of these witnesses, and delayed orderly discovery for many months.
>
> After all the appeals were exhausted and plaintiffs complied with the order to reveal the names of their witnesses, the reason for the plaintiffs adamant refusal became apparent. Specifically, the names and identities of approximately twenty of the seventy-nine witnesses were totally unknown to Mr. Sheehan or the plaintiffs. Several of the disclosed witnesses later stated under oath that they did not know Mr. Sheehan, had never spoken to him, or flatly denied the statements he had attributed to them in his affidavit. The remaining witnesses did not furnish any statements that would be admissible. Much of the testimony of these witnesses involved conversations they allegedly had with other people, which is the

[2] "R" is a reference to the Record below.

> hearsay testimony inadmissible at trial. 705 F. Supp. 1544, 1545 (S.D. 1989).

Moreover, it was appropriate for the Eleventh Circuit to have found the District Court correct:

> Sheehan could not have reasonably believed at the time of the filing of the complaint and the signing of the affidavit that the complaint was well-grounded in fact. Particularly is this true of the affidavit with its unknown, nonexistent, deceased sources, its fabricated testimony, and the deceptive style used to mask its shortcomings. It is obvious that if the appellants knew (must have known) prior to filing this lawsuit that they had no competent evidence, then, this complaint was not well grounded. Additionally, the District Court stated in its order granting attorney's fees and costs that Sheehan's affidavit was the impetus for the two years of discovery. Yet, this discovery did not yield any witnesses who could link the alleged criminal enterprise to the bombing. *Avirgan v. Hull*, 932 F.2d 1572, 1582 (11th Cir. 1991).

The record on appeal was exhaustive and extensive. It consisted of over 50 volumes. Much of the record was inadmissible, confusing, irrelevant and, in many cases consisted of directly deceptive and fraudulent documents of Petitioners.

On appeal, Petitioners filed extensive Briefs, Motions and numerous applications. They enlisted Amici filings of the following groups: National Council of Churches of Christ in the U.S.A., Church of the Brethren, Church Women United, Conference of Major Superiors of Men, Peace Fellowship of the Christian Church (Disciples of Christ), Leadership Conference of Women Religious (Executive Committee), the Maryknoll Fathers and Brothers, and the General Conference Mennonite Church.

There was no evidence ever submitted to support any part of the lawsuit's claims or the appeals. But even on appeal, Petitioners attempted to file "new evidence" of

alleged proceedings in Costa Rica and political documents occurring after the case was dismissed. Respondents were required to answer all of the filings.

Petitioners filed Petitions for Certiorari to this Court to appeal the sanctions of the District Court; Case Nos. 91-617, 91-618, 91-619. They were denied on January 13, 1992.

The Eleventh Circuit granted Respondents' Applications for fees under Rule 38 of the Federal Rules of Appellate Procedure and 28 U.S.C. § 1927, and remanded the case to the District Court for hearing and Judgment on the amount of reasonable fees. The evidentiary hearing is set for October 26, 1992.

SUMMARY OF ARGUMENT

Petitioners have presented no conflict among the Circuits or conflict with decisions of this Court to justify the issuance of a Writ of Certiorari. At best, they argue (inaccurately) that the imposition of sanctions by the Eleventh Circuit was error.

The Eleventh Circuit had ample grounds to determine that the appeals were frivolous. Petitioners misrepresented the Record to the Appellate Court and the submissions they had presented to the District Court. They vexatiously abused the judicial process and refused to abandon meritless appeals for which they knew they had no basis.

The Eleventh Circuit was not required to issue separate, specific findings. The Court followed an established practice among the Circuits. The Panel was thoroughly familiar with the case. The groundlessness of the case was abundantly clear on the face of the record and in the Court's opinion affirming the decisions of the District Court.

ARGUMENT

REASONS FOR DENYING THE WRITS

I. THE RECORD BELOW AND THE APPELLATE COURT'S FAMILIARITY WITH THE MERITS OF THIS CASE SUPPORT ITS FINDING THAT THE APPEAL WAS FRIVOLOUS.

While an unsuccessful appeal of trial court sanctions will not automatically result in the further imposition of sanctions, *Brown v. Nationwide Mutual Insurance Company*, 805 F.2d 1242, 1244 (5th Cir. 1986), sanctions appeals are particularly likely to result in a finding that the appeal is frivolous. As the *Brown* Court added:

> [W]e hasten to add that the appellant should be cautious and circumspect in any appeal involving only sanctions. Such an appeal may justify further sanctions if the sanctions imposed are patently within the trial court's range of discretion and no special circumstances exist. We cannot permit the judicial system, already burdened with frivolous litigation, to be burdened with further frivolous proceedings on the issues of sanctions.

Brown, 805 F.2d at 1244. Indeed, it has been recognized that the wide breadth of trial court discretion with respect to Rule 11 sanctions will, more likely than not, render appeals of such sanctions frivolous. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384; 110 S. Ct. 2447 (1990). In *Cooter & Gell*, this Court stated:

> If the appeal of a Rule 11 sanction is itself frivolous, Rule 38 gives appellate courts ample authority to award expenses. Indeed, because the district court has broad discretion to impose Rule 11 sanctions, appeals of such sanctions may frequently be frivolous. See 9 J. Moore, B. Ward & J. Lucas, Moore's Federal Practice 238.03[2] pp. 38-13, 38-14 (2d ed. 1989) ("[W]here an appeal challenges action or findings of the district court to which an appellate court gives

> deference by judging under an abuse of discretion or clearly erroneous standard, the court is more likely to find that the appellant's arguments are frivolous"). 110 S.Ct. 2447, 2462 (1990).

That opinion further noted that a district court's imposition of Rule 11 sanctions is reviewable only for abuse of discretion.

In this case, the Court of Appeals' plenary review in relation to the entry of Summary Judgment led the Eleventh Circuit to the clear finding that the Complaint in this case was not well grounded in fact and that the case was intentionally pursued without any justiciable basis. The Appeals Court wrote clearly that it had "no difficulty in determining that the proceedings had been unreasonably and vexatiously multiplied by the Appellants." *Avirgan*, 932 F.2d at 1582. In reviewing the sanctions award for abuse of discretion, the Appellate Court determined that the entire case was so obviously frivolous and fraught with abuse that upholding the sanctions award was not even a close call.[3]

Courts consider an appeal frivolous when the result is obvious or the appellant's arguments of error are wholly without merit. *Reliance Ins. Co. v. Sweeney Corp.*,

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[3] Petitioners Avirgan and Honey attempt to distance themselves from Mr. Sheehan by asserting a "pure heart, empty head" defense. See Petition at 13. Courts have uniformly rejected the concept, especially when, as here, appellants have separate counsel. Mr. Sheehan did not solely represent Avirgan and Honey on appeal. See *McCandless v. Great Atlantic & Pac. Tea Co.*, 697 F.2d 198, 200 (7th Cir. 1983). The appeal was a continuation of the sanctionable conduct condemned by unanimous agreement of the federal judiciary. See *Wood v. Commerce, Inc.*, 699 F.2d 484 (9th Cir. 1983). Avirgan and Honey and their appellate counsel should have, but did not, discontinue the abusive action. Under these circumstances there is abundant precedent to hold them individually liable. See *Cowan v. Corley*, 814 F.2d 223 (5th Cir. 1987); *U.S. v. Nesglo*, 744 F.2d 887 (1st Cir. 1984); *McConnell v. Critchlow*, 661 F.2d 116 (9th Cir. 1981).

Maryland, 792 F.2d 1137, 1138 (D.C. Cir. 1986). Therefore "counsel must realize that the decision to appeal should be a considered one, taking into account what the district judge has said, not a knee-jerk-reaction to every unfavorable ruling." *Taylor v. Sentry Life Ins. Co.*, 729 F.2d 652, 656 (9th Cir. 1984).

Here, Petitioners knew that they had fictionalized the case. They pursued the appeals to raise more money and play appellate roulette. There were no substantive issues, and the issues they manufactured were transparent, albeit laboriously fabricated. For example (there are numerous others):

1. Petitioners blatantly misrepresented that the District Court abused its discretion with respect to discovery. Petitioners charged that Respondent Shackley "adamantly refused to comply with the federal rules governing discovery or court orders compelling discovery" and that he failed to identify documents withheld on the grounds of privilege. These statements were not true and were flatly contradicted by the record. (R.23.787. Exhibit D; R19.655.14).

2. Plaintiffs represented to the Eleventh Circuit that Respondent Hull walked out of his deposition and that the District Court excused Hull from continuing his deposition. On the contrary, Hull submitted to a full day of questioning (R51.1278.118-19) and the District Court scheduled a continued deposition for June 6, 1988 in the United States District Court in Miami (R51.1278.129-30).

3. Plaintiffs represented that Respondent Owen improperly obstructed the discovery process. In fact, the opposite was true.

4. Plaintiffs represented to the Appellate Court that, as of the time of the District Court's award of summary judgment, there were a total of ten outstanding discovery motions which the District Court had failed

to rule upon. On the contrary, of the ten motions that Petitioners represented were undecided, the record shows that five of them actually were decided, one was resolved by agreement among the parties, and the remaining four were not even docketed until after the close of discovery. Moreover, although complaining, as it turned out falsely, about the ten allegedly undecided motions, petitioners failed to point out that the District Court, during the course of proceedings, adjudicated a total of seventy-two discovery motions filed by the parties.

5. Petitioners' appeal of the sanctions order was likewise demonstrably frivolous on the record. Petitioners made little effort to defend on appeal the false and misleading Sheehan Affidavit which sustained two years of litigation. Rather, Petitioners argued that the Sheehan Affidavit was *irrelevant* to the case and could not be the foundation for sanctions—an argument that not only was legally and factually untenable, but which contradicted Petitioners' own position below, where they had described the affidavit to Judge King as a "supplement" to the Complaint, relied on it in opposing summary judgment motions, incorporated it in other pleadings, and made it a centerpiece of their fundraising efforts. (The affidavit was for sale to the public as part of the Christic Institute's "Contragate Project" for $10.00).

Petitioners claim that the enormous work of the Respondents and bulk of the Briefs on Appeal are testament to the legitimacy of the issues and the appeals. The truth is, however, that the Appellee Briefs of Respondents were so extensive and complicated because of the enormity of the Petitioners' fraud, deception, and abuse. Petitioners knew that they had no witnesses and no evidence to sustain a successful appeal. Instead, as they did in the Trial Court, on appeal they simply misrepresented the Record, the depositions, and attempted to "spin" the filings. They

enlisted legions of Amici, armed with tears and Briefs. Respondents were forced to respond.

Respondents were faced with the enormous task of dealing with 1200 docket entries, numerous depositions (some of which were days long), incredibly deceptive affidavits and equally deceptive Appellate Briefs. The sweat was in meticulously slicing the truth from the pages and providing accurate citations to a poorly organized, enormous record. Respondents had to coordinate numerous defendants and their counsel, synthesize arguments and different suggested approaches, and file Consolidated Briefs. It was a monumental task. The Record was over 50 volumes in boxes which were shipped back and forth between three cities. The process took months of concentrated and coordinated effort of numerous sets of lawyers. Contrary to Petitioners' suggestion, no amount has yet been awarded for this effort. That decision is pending an evidentiary hearing to be held, at the direction of the Eleventh Circuit, by the District Court.

Petitioners intentionally made the decision, for purely political purposes, to bring this baseless suit and to join numerous innocent Defendants and to conduct this monstrously large and expensive litigation. They admitted to expending far in excess of $2,000,000.00 on the case themselves. However, as they admitted to the panel at oral argument, "although under the best scenario, they did not expect to collect half that amount." See *Avirgan v. Hull*, 932 F.2d 1572 at 1582, n.13 (11th Cir. 1991).

The appeals were simply another outrageous, expensive extension of the vexatious conduct begun by the Complaint. They were, on their face, sanctionable.[4]

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[4] Petitioners filed Briefs consuming over 100 pages, never admitting that they had no admissible evidence that Respondents caused their injuries, and never explaining why they had submitted fraudulent affidavits. The 11th Circuit panel was fully justified in law in its conclusion of the frivolous nature of the appeals. See *Taylor v. Sentry Life Ins. Co.*, 729 F.2d 652, 656 (9th Cir. 1984); *WSM Inc.*

II. AN APPELLATE COURT IS NOT REQUIRED TO MAKE SPECIFIC, SEPARATE FINDINGS WITH RESPECT TO THE FRIVOLOUSNESS OF AN APPEAL.

Petitioners argue in their Petitions that the Court of Appeals acted in a "wholly arbitrary manner" by imposing sanctions under Rule 38 of the Federal Rules of Appellate Procedure and 28 U.S.C. § 1927 because, they claim, it did not explain its rationale for finding Petitioners' appeals to be frivolous.[5] Indeed, so piqued are the Petitioners that they argue it is fruitless to remand for entry of findings by the Court below which, Petitioners assert, would merely lie to cover up its deficiencies. Not only do Petitioners fail to cite case law that requires a court of appeals to issue specific detailed findings under these circumstances; they fail to acknowledge that the prior opinion of the Court of Appeals contains such findings as would support an award under either Rule 38, 28 U.S.C. § 1927 or both.

The same panel of judges that affirmed the Summary Judgment and Rule 11 sanctions award also ruled upon the petition for appellate fess. Due to this panel's familiarity with the merits, their finding that the appeal was frivolous was reasonable and did not require any more explanation than was included in the prior opinion on the merits. In fact, the panel articulated detailed findings in its opinion affirming Rule 11 sanctions.

Petitioners have shown no conflict among the circuits on this issue. An appellate court has no special duty to articulate its reasons for finding an appeal frivolous. In

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v. Tennessee Sales Co., 709 F.2d 1084 (6th Cir.) *Johnson v. Allyn & Bacon, Inc.*, 731 F.2d 64, 74 (1st Cir. 1984).

[5] Interestingly, in their last Petitions for Certiorari, Petitioners had the same complaint of the District Court sanctions order, wherein the District Court wrote a complete, detailed, separate opinion. See *Avirgan v. Hull*, Supreme Court Case Nos. 91-617, 91-618, 91-619.

a similar case involving an award of costs and attorneys' fees under 28 U.S.C. § 1927 and under Fed. R. App. P. 38, the Tenth Circuit has stated that a Court of Appeals is not required to make specific findings:

> When the court finds an entire appeal frivolous, multiplicious or vexatious, it need say nothing more except to state that conclusion, which obviously is based upon the court's judgment on the merits of the issues. *Braley v. Campbell*, 832 F.2d 1504, 1514 (10th Cir. 1987) (en banc).

Petitioners cite no cases requiring specific findings to support a determination that an *appeal* is frivolous. They instead rely on cases relating to Rule 11 awards by a district court. See Petition at 8. The case of *Hensley v. Eckerhart*, 461 U.S. 424, 103 S.Ct. 1933 (1983), revolved around the appropriate measure of attorneys' fees awarded to a prevailing plaintiff under 42 U.S.C. § 1988. In *Hensley*, this Court merely noted the importance of the District Court's providing a concise, clear explanation of its reasons for a fee award.

The other cases cited by Petitioners in support of this alleged specific obligation to explain the basis for an appellate attorneys fee award are similarly mischaracterized. For example, *Thomas v. Capitol Security Services, Inc.*, 836 F.2d 866 (5th Cir. 1988) involved the imposition of Rule 11 sanctions, and the court therein rejected a rule which would require specific findings and conclusions by a district court in all Rule 11 cases.[6] How-

[6] "[W]e adopt a rule today that does not require specific findings and conclusions by a *district court* in all Rule 11 cases. However, the rule we adopt does emphasize the importance of an adequate record for appellate review in those cases in which the violation is not apparent on the record and the basis and justification for the trial judge's Rule 11 decision in not readily discernible . . . We therefore reject a rule that would impose upon district courts the onerous and often time-consuming burden of making specific findings and conclusion in all Rule 11 cases." [emphasis supplied]. *Thomas*, 836 F.2d at 883.

ever, the court did emphasize the importance of an adequate record for appellate review in those cases in which the violation was not apparent on the record. Here, not only is the District Court record painfully extensive, the Appellate Court opinion does contain a justification for the Rule 38 and Section 1927 sanction which is more than "merely discernible." Indeed, the Appellate Court indicated that "on this record we have *no difficulty* in finding that these appellants unreasonably and vexatiously multiplied these proceedings." *Avirgan*, 932 F.2d at 1582. *See also*, *Kiefel v. Las Vegas Hacienda, Inc.*, 404 F.2d 1163, 1167 (7th Cir. 1968); *Clark v. Commissioner*, 744 F.2d 1447, 1448 (10th Cir. 1984); *Reliance Ins. Co. v. Sweeney Corp., Maryland*, 792 F.2d 1137, 1138 (D.C. Cir. 1986).

When the frivolity of the appeal is objectively obvious on the face of the record, procedural trappings, such as a hearing, a separate briefing, and a separate sanctions proceeding, are unnecessary. *Romala Corp. v. U.S.*, 927 F.2d 1219, 1226 (Fed. Cir. 1991). In *Romala*, the Court ordered the imposition of Rule 38 sanctions *sua sponte*, stating, "since our imposition of sanctions is thus based on a frivolity that is wholly contained within the written submission, no separate briefing or argument on the issue would be useful." *Id.* at 1226. In addition, the Court noted that due process does not require any specific notice or opportunity for additional briefing or hearing prior to the imposition of Rule 38 sanctions.[7] Likewise, there is no requirement for explicit and separate findings.

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[7] The *Romala* panel indicated that adequate notice is satisfied by the elementary principle that attorneys are expected to know and follow the federal rules of appellate procedure including Rule 38 and the decisions applying it. In addition, it has also been noted that:

> Where, as in this and most Rule 38 cases, the conduct that is sought to be sanctioned consists of making objectively groundless legal arguments in briefs filed in this court, there are no issues that a hearing could illuminate. All the relevant "conduct" is laid out in the briefs themselves; neither the mental

Petitioners claim that Circuits routinely issue comprehensive appellate sanctions opinions. See Pet. at 8. Petitioners then fashion their own appellate rule *requiring* a separate opinion and pronounce the 11th Circuit guilty of violating Petitioners' "Rule." It is simply more fiction.

Case law in the Eleventh Circuit, as well as other circuits, is replete with examples where the court articulates simply, without further findings, that the appeal or claim is "frivolous" and thereupon imposes sanctions. See, for example, *Hale v. Harney*, 786 F.2d 688 (5th Cir. 1986), *U.S. v. Nesglo*, 744 F.2d 887 (1st Cir. 1984), *Motes v. United States*, 785 F.2d 928 (11th Cir. 1986); *United States v. Rayco, Inc.*, 616 F.2d 462, 463 (10th Cir. 1980). This case, which had consumed four separate opinions, required no more.

Petitioners have disingenuously argued that the Eleventh Circuit Court of Appeals has "refused" [8] to furnish a rationale for its determination of frivolousness. To the contrary, the very same Court of Appeals panel that made the determination of frivolousness had previously stated its findings in the opinions affirming the trial court's judgment and awards. Petitioners ignore the findings contained in that opinion which specifically underline the frivolousness and vexatious multiplication of the entire litigation.

Petitioners scandalously speculate that should this Court remand the issue for a separate statement of findings,

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state of the attorney nor any other factual issue is pertinent to the imposition of sanctions for such conduct. *Hill v. Norfolk and Western Ry.*, 814 F.2d 1192, 1201-02 (7th Cir. 1987).

[8] This "refusal" was in response to Petitioners' unprecedented demand, in a Petition for Rehearing, that the Court of Appeals respond to 11 specific questions posed by Petitioners. See Avirgan and Honey Petition at 27a-31a. This demand is reminiscent of Petitioners' motion in the District Court wherein Mr. Sheehan demanded that Judge King disclose communications with Judge Gessell and answer his impertinent questions about discovery.

the Court of Appeals panel would attempt to improperly justify its order after the fact by providing reasons clothed with "discretion-exercising phrases." These are the same Petitioners, who, after they lost in the District Court, appeared on network news to accuse District Judge King of complicity with the "Secret Team" (Respondents) and President George Bush. Thus, even if the panel had repeated, by separate order what Petitioners claim is absent, they would be here anyway claiming the findings insincere. These word games are Petitioners' *imprimatur* and demonstrate the abuse to which the Federal Judicial Process has been, and continues to be, put.

CONCLUSION

For the foregoing reasons, the Petitions of Avirgan, Honey, The Christic Institute and Daniel Sheehan should be denied.

Respectfully submitted,

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